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VIA ELECTRONIC FILING

The Honorable Jocelyn G. Boyd
Chief Clerk/ Executive Director
Public Service Commission of South Carolina
101 Executive Center Drive, Suite 100
Columbia, SC 29210

Re: Applications of Duke Energy Progress, LLC and Duke Energy Carolinas, LLC for Approval of Smart $aver Solar as Energy Efficiency Program and

Docket Nos. 2021-143-E & 2021-144-E

Dear Ms. Boyd:

I am filing this reply to the S.C. Office of Regulatory Staff's ("ORS") response ("ORS Response") to the request of Duke Energy Carolinas, LLC and Duke Energy Progress, LLC (together, the "Companies") that the procedural schedule in the above-referenced dockets be consolidated and amended, and that any surrebuttal testimony filed in these proceedings be accompanied by a motion for leave to file surrebuttal testimony. These dockets concern the Smart $aver Solar energy efficiency ("EE") programs proposed by the Companies in applications filed on April 23, 2021.

While ORS asserts that the programs proposed in the applications are "novel," "unprecedented," and "recently developed"—and therefore that ORS needs more time to evaluate them—the programs are, at bottom, routine EE/DSM programs based on a widely-accepted EE/DSM customer incentive model that has been operating effectively in South Carolina for many, many years. While it's true that EE/DSM programs and measures take many different forms, those proposed in this case are cost-effective programs that comport with the Commission-approved EE/DSM Mechanism and S.C. Code Ann. § 58-37-20. Just last week, the Commission issued an order finding that "[a]ll self-generation that is consumed by a customer-generator within the billing period is, from the system perspective, equivalent to energy efficiency or demand-side management measures as a decrement to system load." Order No. 2021-569 at 9-10, Docket No. 2019-182-E (Aug. 19, 2021). The Commission also ordered that, in "future proceedings, behind-the-meter generation used by customer-generators shall be treated as energy efficiency or demand-side management resources." *Id.* at 52. The Companies disagree with ORS that the programs—which reduce load akin to EE, and which find ample support in the

EE/DSM Mechanism and statute—are far afield from existing EE/DSM programs in their operation and effect.

ORS also argues that the Companies' proposal to amend the procedural schedule would "substantially reduce the amount of time ORS has to review Duke Energy's request and prepare direct testimony." The Companies do not agree. The Companies filed the applications on April 23, 2021. Under the current schedule, ORS's testimony will be due 151 days from when the applications were filed. Under the Companies' proposal, ORS's testimony would be due 140 days from when the applications were filed, a modest reduction in the overall amount of time ORS has had to review the applications. That ORS waited until four months into a proceeding to hire a consultant to assist it in "developing its recommendations and position in the respective dockets" is a circumstance of its own making and should not prejudice the Companies' ability to understand the positions articulated in the direct testimony of other parties by tightening the procedural schedule.

While ORS states that the Commission should not "expedite the procedural schedule," the Companies have not requested that the schedule be "expedited." Instead, the Companies are asking that the procedural schedule be internally adjusted to create a more equitable schedule. As the schedule is currently, there will be insufficient time for the Companies to review other parties' direct testimony and prepare rebuttal testimony, and the Companies have proposed to "create space" in the schedule by filing their direct testimony early. While ORS and the other parties have had four months to review the Companies' applications and conduct discovery on the Programs as presented in the applications, the Companies will have only seven days—under the currently existing schedule—to review intervenor direct testimony. There is room for improvement in these very disparate timelines.

While ORS claims that the Companies could seek "the production of underlying information and data that will form the basis of the positions ORS and the other parties of records will advance in this matter," it is the experience of the Companies that other parties have nothing to produce until their testimony has been filed. For that reason, while ORS and other parties have had months to consider the Companies' applications and discovery responses, there is an information imbalance when it comes to the Companies' understanding of other parties' positions and underlying support. Once the ORS and intervenors file their testimony, the Companies need to be afforded a reasonable opportunity to review that testimony, develop and serve discovery responses, receive those responses and incorporate that information into rebuttal testimony. That cannot be accomplished in seven days in this docket.

Additionally, the weeks between rebuttal testimony and surrebuttal testimony being filed as proposed by ORS is unwarranted. Parties will not need the same amount of time to prepare surrebuttal as the Companies need to prepare rebuttal, and—if

ORS's surrebuttal is as limited as it suggests it will be—they will not need two full weeks to prepare it. Preparation time is valuable, certainly, in other parties' review of a utility's application—which contains the utility's first presentation of its proposal—and in a utility's review of other parties' direct testimony—which contains other parties' first presentation of their own views. Surrebuttal, in contrast, is a reply to a reply to, in essence, a reply (i.e., other parties' reactions to the utility's proposal), and there should be no novel content provided in surrebuttal. For that reason, the Commission rightly and routinely limits the amount of time for its preparation. In light of these facts, the schedule proposed by the Companies, reproduced again below for ease of reference, is eminently reasonable:

Proposed Schedule		
8/20/2021		DEC/DEP Direct Testimony
9/10/2021	21	ORS/Intervenor Direct Testimony
10/1/2021	21	DEC/DEP Rebuttal Testimony
10/11/2021	10	ORS/Intervenor Surrebuttal Testimony (upon motion and showing that surrebuttal is warranted)
10/26/2021	15	Hearing (virtual)
11/9/2021	14	Proposed Orders

ORS also pushes back on the notion that it should defer to the discretion of the Commission by seeking leave to file surrebuttal testimony, instead asserting that it has a right to file surrebuttal testimony. The support for its argument, however, is very thin. The primary support is dictum from a 1993 S.C. Court of Appeals opinion, *Camlin v. Bi-Lo, Inc.*, 311 S.C. 197, 428 S.E.2d 6 (Ct. App. 1993) (*Camlin*). Dictum, however, is not the law,[1] and the S.C. Supreme Court's jurisprudence on this issue has evolved since the 1899 and 1916 cases on which *Camlin* and ORS rely. Further, even in *Camlin*, the Court of Appeals found that the lower court did not abuse its discretion in disallowing the surrebuttal testimony.

The more on point law is *Palmetto Alliance Inc v South Carolina Public Service Commission*, 282 S.C. 430, 319 S.E. 2d 695 (1984) (*Palmetto Alliance*), upon which the Commission recently relied in finding that surrebuttal testimony is "discretionary with the Commission." Order No. 2021-357 at 2, Docket No. 2005-83-A (May 18, 2021). In *Palmetto Alliance*, an intervenor argued that it should have been permitted to present surrebuttal evidence in response to the utility's rebuttal evidence. The S.C. Supreme Court found that the presentation of surrebuttal evidence is discretionary with the Commission, and that there was "no element of unfair surprise in the limited scope and presentation of the rebuttal evidence offered by [the utility]." *Palmetto Alliance*, 282 S.C. at 439. The Court also pointed to the availability to the intervenor of other ways to participate in the proceeding through, for

[1] *Gordon v. Lancaster*, 425 S.C. 386, 395, 823 S.E.2d 173, 178 (2018), Few, J., concurring ("Dictum is not the law.").

example, briefs or a proposed order. *Id.* Indeed, only a year ago, the Commission denied ORS's so-called "right" to file surrebuttal testimony, again finding that it was "discretionary with the Commission" and finding that the parties would have other ways to participate in the proceeding through cross-examination and reviewing exhibits prior to their being placed into evidence. Order No. 2020-431 at 3-4, Docket No. 2019-281-S (July 6, 2020).

In contrast to that case, the Companies are not proposing that surrebuttal testimony be eliminated or in any way limited beyond what the caselaw upon which ORS relies provides for. The Companies are merely requesting that ORS and other parties make a showing that their surrebuttal testimony is being proffered in response to new matters injected for the first time in the Companies' rebuttal testimony, consistent with this state's caselaw as explained in the Companies' request. While ORS points to the Commission's "long-standing practice" of simply letting parties file surrebuttal testimony as they see fit, a claim of "long-standing practice" is inadequate and the Companies applaud the Chairman's diligence in reevaluating practice and procedure before the Commission, no matter how long-standing certain practices may be.

With ORS's proposal to shrink the amount of time between surrebuttal testimony and the hearing down from twenty-one days as proposed in the Clerk's procedural schedule down to seven days as proposed in the ORS Response, the importance of this issue is magnified. ORS offers that if the surrebuttal testimony exceeds the permissible scope, the Companies could simply file a motion to strike. In the seven days ORS proposes that the Companies should be reviewing surrebuttal testimony and preparing and filing a motion to strike—never mind that S.C. Code Ann. Regs. 103-829(A) requires that motions be filed at least ten days prior to a hearing—the Companies should be preparing for the hearing like ORS will be, not parsing ORS's testimony to ensure it matches what the law requires.

While ORS claims that its due process rights would be compromised were it denied an opportunity "to present evidence it deems sufficient to support its position," due process does not turn on the level of process a particular party "deems sufficient." More importantly, ORS—as a state agency—*has* no due process right because the Constitution protects citizens from the state, not the state from itself. *Hibernian Society v. Thomas*, 282 S.C. 465, 472–73, 319 S.E.2d 339, 343–44 (Ct. App. 1984) (*Hibernian Society*). As explained in *Hibernian Society*, this is so because "a governmental agency created and controlled by a state is not a 'person'" as contemplated in and protected by the Constitution. Indeed, ORS is an "agency of the State" and not a person as contemplated in the S.C. Constitution. S.C. Code Ann. § 58-4-10(A). In significant contrast, the Companies *are* constitutionally entitled to a fair and impartial procedure, and would be substantially prejudiced by an inadequate period to review other parties' testimony, and by a party shrugging off the Commission's discretion as gatekeeper of what testimony is admitted and what testimony is not.

The procedural schedule proposed by the Companies provides ample time for ORS to prepare testimony, would provide sufficient time for the Companies to prepare rebuttal testimony, and is grossly more equitable than that proposed by ORS.

Kind regards,

Sam Wellborn

C: Parties of Record (via email)
Heather Shirley Smith, Deputy General Counsel (via email)